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No. 98-1715

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT R. KRILICH, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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INTRODUCTION

In seeking to avoid this Court's review of the important issues presented by this case, the government's brief in opposition misstates the record and applicable precedent, and greatly understates the conflicts between the decision below, decisions of other courts, and the views of a majority of this Court. This Court should grant certiorari to put to rest substantial disputes over the proper reach of 18 U.S.C. § 1014, and over the application of important Federal Rules of Evidence and Criminal Procedure.

ARGUMENT

A. Section 1014 Is Inapplicable Here.

1. The Government's Interpretation of the Statute Slights Its Language, and Ignores Both This Court's Precedents and the Statute's Legislative History.

The government argues that the language of section 1014 is "unqualified," and that "[p]etitioner's conduct falls squarely within [its] scope . . . ." It is wrong on both counts.

The government's appeal to the statute's text in support of its argument for an expansive reading of section 1014 misses the mark. The government asserts that "[t]he statute enumerates a long list of the types of transactions covered, and a loan is only one item on that list." Gov't Opp. at 10. The government argues, therefore, that limiting the statute to credit transactions "would render the other enumerated terms superfluous." Gov't Opp. at 10. This argument is unfounded. The statute's list of transactions includes transactions that are part and parcel of the lending process, such as "commitment" and "advance," but fails to include other transactions such as "deposit" and "withdrawal." Were the statute actually intended to sweep as broadly as the government suggests, the statute would most certainly include these typical transactions as well.

The government also asserts that if section 1014 were limited to lending transactions, "there would be no rational explanation" for the statute's inclusion of institutions that do not, themselves, make loans. Gov't Opp. at 11. Once again, this argument comes up short. Although the institutions at issue – including the Farm *Credit* Insurance Corporation and the National *Credit* Union Administration Board – do not

lend money, they do regulate and supervise the lending activities of other institutions that lend money. Their inclusion in the list of institutions covered by section 1014 is entirely consistent with the statute's prescribed scope.

The government also misreads this Court's precedents in arguing against review. In *INS v. National Center for Immigrant's Rights, Inc.*, 502 U.S. 183 (1991) (*NCIR*), this Court was asked to interpret a regulation the text of which was as "unqualified" as the government now claims section 1014's is. The INS regulation at issue governed bonds securing the release of aliens pending deportation or exclusion proceedings. Its text plainly provided for "[a] condition barring employment" in such bonds, *id.* at 185, and the court of appeals, interpreting that "unqualified" language to bar all employment, whether authorized or not, invalidated the regulation. *Id.* at 189. Relying, *inter alia*, on the regulation's title, which limited the condition to *unauthorized* employment, this Court found the regulation ambiguous. The Court held that "[t]he text's generic reference to 'employment' should be read as a reference to the '*unauthorized* employment' identified in the paragraph's title." *Id.*

The government here attempts to distinguish *NCIR* by noting that in *NCIR*, it "acknowledged" that the regulation at issue was ambiguous. Gov't Opp. at 12 n.7. But the government's position here – that ambiguity cannot be created by a dissonance between section 1014's text and its title – is flatly inconsistent with the position it took, and this Court adopted, in *NCIR*.

The government's dismissal of this Court's canvass of section 1014's legislative history in *Williams v. United States*, 458 U.S. 279 (1982), is similarly misguided. Although the decision in *Williams* involved the definition of

the term "statement" in the statute, rather than the question of what transactions the statute reaches, the decision clearly informs the latter question. In *Williams*, the Court held that a "narrow interpretation" of section 1014 is appropriate because this is "a statute that is not unambiguous in its terms . . . that if applied here would render a wide range of conduct violative of federal law [and the] legislative history . . . fails to evidence congressional awareness of the statute's claimed scope." *Id.* at 290. The same is true here.

2. There Is a Square Conflict Among the Circuits With Regard to the Scope of Section 1014.

The government asserts that there is "no 'true conflict'" among the courts of appeals with regard to the application of section 1014. Gov't Opp. at 14. However, the government's characterization of the ruling in *United States v. Devoll*, 39 F.3d 575 (5th Cir. 1994), as "dictum," Gov't Opp at 15, ignores the Fifth Circuit's clear announcement in that case of a rule intended to be applied in future cases.

In *Devoll*, the court described its earlier decisions on this point as "ambivalen[t]," and on that basis, found that the trial court's error was not "plain." 39 F.3d at 580. But to remedy that ambivalence, the court stated plainly, "[w]e hold today that section 1014 relates only to lending activities by financial institutions." *Id.* at 579. The *Devoll* court found that the statute's language "specifies that the false representation or fraud must be made for a purpose connected with the various lending activities or practices of the financial institution." *Id.* at 580. The court also traced the statute's legislative history, concluding that it indicated that the statute was intended to apply solely in the context of lending activities. *Ibid.* The government errs in asserting

that *Devoll* is anything less than a clear statement by the Fifth Circuit as to the law to be applied in that circuit.

The government also asserts that some further "develop[ment]" is required before the conflict between the decisions of the Seventh and Fifth Circuits becomes a "true conflict." But it is difficult to imagine what further development is necessary, or even possible. In *Devoll* and this case, the Fifth and Seventh Circuits have stated, plainly, positions that cannot be reconciled. Other courts facing the issue will necessarily agree with one or the other, and waiting for a final tally would serve no purpose, while making the application of federal criminal law an accident of geography. This Court should decide the matter, and eliminate the conflict, now.

B. The Seventh Circuit Improperly Applied Federal Rule of Criminal Procedure 11(e)(6) and Federal Rule of Evidence 410.

The government attempts to downplay the discrepancy between the court of appeals' decision and the views of a majority of this Court in *United States v. Mezzanatto*, 513 U.S. 196 (1995), asserting that the concurrence in that case "did not reach" the question whether a waiver of the proffer rules that "severely undermines a defendant's incentive to negotiate, and thereby inhibit[s] plea bargaining" is permissible. Gov't Opp. at 18-19. However, by expressly limiting their concurrence in the result of *Mezzanatto*, Justices Ginsburg, O'Connor and Breyer clearly took the position that waivers of the protections of Rules 11(e)(6) and 410 must be carefully limited, and that the Rules may not be interpreted in a way that would hinder plea bargaining. *Mezzanatto*, 513 U.S. at 211 (Ginsburg, O'Connor and Breyer, JJ., concurring).

The government seeks to bring the result in this case within the reasoning of the *Mezzanatto* concurrence, noting that only "genuine inconsistency" between proffer statements and evidence adduced at trial may render those statements admissible," and acknowledging that "[s]tatements are inconsistent only if the truth of one implies the falsity of the other." Gov't Opp. at 8. However, the government's attempt to reconcile the decision below with the principle the government now advances is faulty.

The government asserts that petitioner elicited testimony at trial that "affirmatively indicated that he could not have faked the hole-in-one and that he had not bribed the mayor." *Id.* The government asserts further that petitioner "sought to establish that a legitimate hole-in-one had occurred." Gov't Opp. at 7. These two claims by the government are, simply and completely, incorrect. While petitioner did elicit testimony indicating that the government's witnesses had not seen him staging the hole-in-one, he did not adduce *any* evidence that a real hole-in-one actually occurred or denying that he had staged the hole-in-one.

This difference is critical because a defendant who admits his guilt in a proffer does not take a position inconsistent with that admission by simply casting doubt on the government's ability to meet its burden of proving guilt beyond a reasonable doubt. If, as the court of appeals held here, casting doubt on the government's proof is held to render proffer statements admissible, a proffering defendant, in the words of the trial court, "might as well plead guilty."

Evidence that witnesses did not recall seeing petitioner at the ninth hole at the time of the hole-in-one, Gov't Opp. at 7, did not suggest that a legitimate hole-in-one had occurred. Nor did testimony that the ninth hole was

easily observable suggest that petitioner did not rig the hole-in-one; it simply suggested that the government failed to *prove* that he did. A defendant who admits in a proffer to brandishing a weapon before a crowd of people would not take a position inconsistent with his proffer by noting that the government had failed to produce a single member of the crowd to testify to that effect.

The government also errs in suggesting that petitioner took a position inconsistent with the proffer when he presented "testimony . . . that no bribe was necessary for the substitution of the plat known as Exhibit C because the city attorney believed the new zoning was proper." Gov't Opp. at 7. A defendant who proffers has every right to inform the jury that the government's proof falls short. In this case, petitioner had every right – notwithstanding his proffer – to inform the jury that there was nothing inherently sinister about the substitution of the plat, and the jury should not allow the government to satisfy its burden of proof by pointing to the fact that the plat was substituted. All that petitioner did was to present *truthful* evidence about the city attorney's view that the substitution was entirely proper.

The government asserts that petitioner's presentation at trial was "plainly designed to convey a message of actual innocence," Gov't Opp. at 18, but its argument, and the court of appeals' decision, makes clear the danger of confusing evidence casting doubt on the government's proof with a claim of actual innocence. The right to contest the government's proof is firmly embedded in our criminal system, and extends to both those who are factually innocent and those who are factually guilty. *United States v. Wade*, 388 U.S. 218, 257-58 (1967) (White, J., concurring in part and dissenting in part). If, as happened here, a defendant who proffers renders his admission of guilt admissible by contesting the government's proof, he is unable to mount any

defense at all. The ultimate result would be the end of plea bargaining. A majority of this Court would reject such a result, and should do so in this case.

Respectfully submitted,

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